No. 76-1171

In the

Supreme Court of the United States

OCTOBER TERM, 1976

JAMES Y. CARTER, Public Vehicle License Commissioner of the City of Chicago,

Petitioner,

vs.

LUTHER MILLER, on his own behalf and on behalf of all others similarly situated,

Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a licensing scheme which allows licensees recently convicted of certain crimes to retain their licenses, yet forever bars even from consideration for licensure applicants convicted of exactly the same crimes years before.

STATEMENT OF THE CASE

By virtue of Chapter 28.1-3 of the Chicago Municipal Ordinances, chauffeur's licenses are forever unavailable to certain classes of ex-offenders, including persons convicted

"of a crime involving the use of a deadly weapon . . .". In September, 1974, plaintiff Luther Miller sought licensure. On the basis of the ordinance, his application was routinely denied. Miller had been convicted in 1965, at age 20, of armed robbery. In February, 1972, he was released on parole, and 18 months later he was discharged therefrom, having satisfactorily fulfilled the terms of his parole agreement.

Notwithstanding the bar on licenses being granted to former offenders, Chapter 28.1-10 of the Chicago Municipal Ordinances provides that already licensed public chauffeurs who are—after licensing—convicted of the same crimes as are set out in Chapter 28.1-3 do not confront the same ban as did plaintiff Miller. Rather, licensed drivers may retain their licenses, subject to revocation upon recommendation of the defendant and subsequent exercise of discretion by the mayor. This revocation procedure includes a hearing. (Pet. Br., at 8).

In sum, a licensed driver convicted of armed robbery today may retain his license; an unlicensed applicant for licensure who at any time in the past was convicted of armed robbery can never obtain a license, no matter what his age at the time of the offense and no matter how many years have elapsed since he satisfactorily completed the sentence imposed.

As a result of his denial of licensure, plaintiff Miller filed suit in Federal District Court. He alleged, among other contentions, that the licensing scheme violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the suit.

The Court of Appeals for the Seventh Circuit reversed and remanded in a per curiam decision. The appellate

court relied at the outset on its decision of four years earlier, *Freitag* v. *Carter*, 489 F.2d 1377 (7th Cir. 1973), in which it had held that "the due process clause of the Fourteenth Amendment required that a 'governmental licensing body which judges the fitness of an applicant must afford that applicant adequate notice and a hearing.'" (Pet. Br., App. B, at 5a).[1] Plaintiff Miller was just such an applicant. The bar of Chapter 28.1-3, however, had resulted in his being afforded neither notice nor a hearing, and indeed so long as the absolute ban on former offenders existed "such a hearing on . . . (his) application . . . would be a mere formality . . .," as the Court viewed the matter. (Pet. Br., App. B., at 5a).

The appellate court went on to reason that the licensing scheme irrationally discriminated by treating persons convicted of the same crime in two manners—licensees are allowed to retain licensure, applicants are forever barred from obtaining it. In so doing, the Court examined the ordinance scheme, accepted the legitimacy of the ends sought, but found the means irrational. It stated:

> The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how

[1] In so holding, the *Freitag* Court relied on well-established doctrine set down by this Court: *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117 (1926).

short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch. 28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation.

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment.

Pet. Br., App. B, at 6a.

The defendant now petitions this Court for the grant of a writ of certiorari to review the Court of Appeals' decision.

REASONS FOR DENYING THE WRIT

The issues presented in the petition are insufficient to warrant plenary review when judged by the standards established in Supreme Court Rule 19. There is no conflict with a decision of another Court of Appeals or of this Court; there is no unsettled question of federal law which should be decided by this Court; there is no important state question decided in conflict with applicable state law.

The Court of Appeals' decision is a narrow and relatively unimportant one, confined to a licensing matrix whose intersecting parts together create a *sui generis* scheme. The minor judicially-mandated modification imposed here carries with it virtually no impact for any other licensing system. Moreover, the decision is entirely consistent with well-established decisional law.

The Court of Appeals simply held that if the city establishes a characteristic as critical to licensure—that is, being an ex-offender—it may not treat similarly situated persons bearing that same characteristic differently. Under the licensing scheme before the Court, persons who committed certain offenses years before are barred from licensure. Nonetheless, other persons committing the same otherwise disabling offense may, at the defendant's and the mayor's discretion, retain their license, even though the criminal act occurred recently. In light of the professed purpose of the ordinance—the protection of public safety—this scheme was found to be, as it is, wholly irrational.[1]

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[1] This Court has decided on several occasions that even though a particular class of persons is not protected from certain governmental actions, schemes which irrationally discriminate among those class members are unconstitutional. *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *Baxtrom* v. *Herold*, 383 U.S. 107 (1965).

Failing to identify any aspect of Rule 19 which warrants the grant of his petition, petitioner seeks to argue a case that is indeed not even before this Court. Petitioner contends that the Court of Appeals held that the respondent has a right to "a hearing as a matter of equal protection." (Pet. Br., at 7). From this erroneous assertion petitioner proceeds to an argument of terribles: the decision (as petitioner misconstrues it) "suggests a wholly new theory of entitlement of hearings in governmental licensing proceedings." (Pet. Br., at 9). Expanding upon its chimerical parade of horrors, petitioner then offers the further notion that the Appellate Court's decision "will open the door to claims for hearings by unsuccessful aspirants to public employment" (Pet. Br., at 9).

How petitioner arrives at such conclusions is unknown to respondent, as it surely must be as well to the Court of Appeals.

Apart from the inherent irrationality of the licensing system, the scheme further fails given the mandate of *Freitag* v. *Carter, supra*. In *Freitag*—in which, in fact, the petitioner was also the defendant—the Court of Appeals held that the petitioner could not deny licensure to any applicant without first providing notice and a hearing. *Freitag* of course in no way required grant of the license, but only that certain procedural elements accompany consideration of the license application.

From *Freitag* flows the conclusion that a scheme providing for a "revocation procedure (which) includes a hearing" (Pet. Br., at 8) for some armed robbers—that is, already licensed felons, yet denies even the possibility of the exercise of discretion for others who are, to quote the Court, "similarly situated," is violative of the Equal Protection Clause. (Pet. Br., App. B., at 6a). The decision

below thus indeed did not establish a right to a hearing under the Equal Protection Clause, petitioner's strange view of the ruling notwithstanding. Rather, all it recognized was the demand for equality of treatment within an already existing procedural framework.

Apparently, four years later, petitioner has decided that it does not like the *Freitag* ruling. Why it did not seek relief in this Court when *Freitag* was decided is unknown. That it should now seek to do so is anomalous, to say the least.

CONCLUSION

The issue at stake in this case is insufficient to fall within the parameters of Rule 19 of this Court. Moreover, the Court below correctly decided the issue involved herein. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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